

Staff
Summary
Report



To: Mayor & City Council
Through: City Manager

Agenda Item Number 9
Meeting Date: 08/09/01

SUBJECT: Agreement to refund permit and development fees to Riverview.

PREPARED BY: C. Brad Woodford, City Attorney (350-8229)

REVIEWED BY: C. Brad Woodford, City Attorney (350-8229)

BRIEF: Motion to authorize the Mayor to execute an agreement with Riverview and acceptance of a reimbursement agreement with the Cardinals.

COMMENTS: **STADIUM (0902-32)** The City of Tempe has collected permit and development fees from Riverview for the construction of 466 residential units on property within Papago Park Center. The Cardinals wish to acquire the leasehold property in order to use it for a portion of the new stadium site to be built by the Tourism and Sports Authority (TSA). If the site is acquired, the residential units will not be built and the development and permit fees would thus not be required. In the event for any reason the leasehold interest is not acquired by the Cardinals, the Cardinals have agreed to reimburse the City of Tempe for the development and permit fees and allow Riverview to proceed with the apartments.

Document Name: (20010809casg01) Supporting Documents: Yes.

SUMMARY: Authorize the Mayor to sign an agreement with Riverview at Rio Salado, L.L.C. to reimburse permit and development fees in the amount of \$1,269,311.50 to enable the Cardinals to acquire the leasehold interest and move the Stadium onto a portion of the property leased by Riverview within Papago Park Center. Also, the acceptance of a letter agreement from the Cardinals organization to reimburse the City of Tempe for the permit and development fees in the event that the property is not acquired and Riverview proceeds to develop on the leasehold property in Papago Park Center.

RECOMMENDATION: Authorize the Mayor to execute the agreement with Riverview and acceptance of reimbursement agreement with the Cardinals.

FISCAL NOTE: No fiscal impact.

August 9, 2001

Riverview at Rio Salado, L.L.C.
c/o Magellan Development, L.L.C
2777 E. Camelback Road, Suite 150
Phoenix, Arizona 85016

Attention: David Dewar

**Re: Riverview at Rio Salado, LLC/Acquisition by B&B Holdings,
Inc. and the City of Tempe, of Leasehold Interest in and to
approximately 12.6 acres in Papago Park Center**

Dear Mr. Dewar:

On behalf of the City of Tempe, an Arizona municipal corporation ("**Tempe**"), we submit this letter of intent ("**LOI**") for your review. The provisions set forth below, if deemed acceptable, will form the basis for drafting a definitive and binding agreement (the "**Agreement**"), which in turn will be subject to the mutual approval and execution by the parties. Accordingly, although this LOI, if countersigned by you to indicate your approval, shall serve to evidence the mutual intent of the parties, it shall not be deemed to be a binding agreement between the parties.

Presently, Riverview at Rio Salado, LLC, an Arizona limited liability company ("**Riverview**") and Papago Park Center, Inc., an Arizona corporation ("**PPC**") are parties to that Papago Park Ground Sublease dated June 9, 2000 (the "**Existing Lease**"), which provides for the lease by Riverview of certain premises in the Papago Park Center (the "**Riverview Parcel**"), near Washington Street and Center Parkway, in Tempe, Arizona. The Existing Lease permits the use of the Riverview Parcel for a first-class, upscale multi-family residential housing development containing approximately 466 residential units (the "**Project**"). The Project is being developed and constructed by Riverview for its own use and account. Also, B&B Holdings, Inc., an Arizona corporation ("**B&B**") and Tempe, on the one hand, as well as The Tourism and Sports Authority, an Arizona body politic ("**TSA**") on the other hand, have each been negotiating with PPC for two (2) leases for property within Papago Park Center, located west of, and adjacent to Riverview Parcel.

1. Leasehold Estate: Subject to the consent of PPC, Riverview and PPC would agree at the "Closing" (defined below) to assign the lessee's interest under the Existing Lease to B&B and Tempe on an AS-IS basis with no representations or warranties by Riverview except as expressly set forth in the Agreement. The parties would use their mutual and diligent efforts to cause PPC, as ground lessor, to enter into a modification of the Existing Lease, on such terms and conditions as are deemed acceptable to Tempe.
2. Consideration: **Construction/Building Permit Refund:** Tempe will refund the construction permit fees paid by Riverview for the Project to date, in the amount of \$1,269,311.50, within three (3) business days of the execution of the Agreement. The permits will not be required to be surrendered to Tempe, and such permits shall remain in full force and effect. The refund of permit fees would be deemed fully earned on the date paid, and non-refundable to Tempe. The approval by the City Council shall be requested to occur prior to August 10, 2001. If for any reason Tempe elects not to pursue the transaction and notify Riverview within the Contingency Period, then the \$1,269,311.50 permit refund shall be retained by Riverview, the Agreement shall terminate, and neither party shall have any claim or liability thereafter, other than indemnification obligations which are expressly stated as surviving.
3. Due Diligence: Riverview shall provide either originals or copies of all reports generated or prepared by third parties which describe the condition of the Riverview Parcel, such as surveys, tests, studies and similar documents, as soon as possible, but in no event later than five (5) days after the execution of the Agreement. Riverview will grant Tempe, and its consultants rights of entry and investigation on the Riverview Parcel, and in this effort, Tempe shall be responsible for any damage or liability incurred, and shall agree to indemnify Riverview from any claims arising from

such entry, which indemnity covenant shall survive any termination of the Agreement.

4. Critical Dates:

The parties believe that a definitive Agreement can be negotiated, prepared and executed on or before Friday, August 10, 2001. Although the Agreement will be subject to the review and approval by the Tempe City Council, we will attempt to obtain such approval at the time of execution. The assignment of the Existing Lease shall occur on Wednesday, October 10, 2001, or at the election of Tempe an earlier date (the "**Closing Date**"). Because the assignment of the Existing Lease will be to B&B and Tempe, jointly, we require that all critical dates in the definitive agreement between B&B and Riverview be synchronous with the same dates as the Agreement.

5. Miscellaneous:

First American Title Insurance Agency (Carol Peterson) shall act as escrow agent for the transactions described herein. After consultation with tax consultants, Riverview shall have the right to request changes in the structure of the transactions described herein, subject to the reasonable review and approval of Tempe.

If the provisions set forth in this LOI are acceptable to you, please execute where indicated below and return an executed copy to the undersigned. At such time as we have received a fully executed counterpart, we will commence drafting of the definitive agreement. Notwithstanding the execution of this LOI or the Agreement contemplated herein, Tempe is not waiving its rights of eminent domain in regard to the Existing Lease or the Riverview Parcel.

Very truly yours,

CITY OF TEMPE, an Arizona municipal corporation

By: _____
Will Manley
City Manager

Riverview at Rio Salado, L.L.C.

August 8, 2001

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ACCEPTANCE AND AGREEMENT

The undersigned has executed this Letter of Intent as an expression of approval of the terms set forth, and agrees that no party shall be bound unless and until a definitive agreement may be negotiated and executed.

RIVERVIEW AT RIO SALADO, LLC,
an Arizona limited liability company

By: RIVERVIEW INVESTMENTS, LLC,
an Arizona limited liability company

Its: Sole Member

By: KINGSTON CAPITAL CO., LLC,
an Arizona limited liability company

Its: Authorized Member

By: _____
David C. Dewar

Aug-08-2001 15:11 From-

T-883 P.002/003 F-414

**arizona cardinals**P.O. Box 888, Phoenix, AZ 85001-0888 • PHONE 602/378-0101 • www.azcardinals.com

August 8, 2001

Mayor Neil G. Giuliano
City of Tempe
31 East 5th Street
Tempe, Arizona 85281

Re: Proposed Transaction with Riverview at Rio Salado, LLC

Dear Mayor Giuliano:

The City of Tempe and B&B Holdings, Inc., an Arizona corporation d/b/a Arizona Cardinals (the "Arizona Cardinals") are negotiating jointly with Magellan Development, LLC (and specifically, its affiliate Riverview at Rio Salado, LLC ("Riverview")) in order to acquire a leasehold interest of all or a portion of the approximately 12.6 acres presently under lease by and between Riverview and Papago Park Center, Inc., an Arizona corporation, pursuant to that Papago Park Center Ground Sublease dated June 9, 2000. Presently, the proposed terms of such an arrangement with Magellan are the subject of a letter of intent dated as of the date hereof (the "Magellan LOI").

A provision of said letter of intent is the refund by the City of Tempe to Magellan of the construction and permit fees paid previously by Magellan, in the total sum of \$1,269,311.50. Notwithstanding the refund of these fees to Magellan, the building permits will continue to be viable and valid in accordance with terms, stipulations and conditions thereof.

Accordingly, in the event that the Arizona Cardinals elects to terminate the definitive agreement (contemplated by the Magellan LOI) during the "Contingency Period" (as defined in the Magellan LOI) and thereafter Magellan proceeds with the construction of the improvements which are contemplated by the permits, then the Arizona Cardinals shall pay to the City of Tempe the proceeds previously refunded to Magellan, in the amount of \$1,269,311.50. The City of Tempe may also elect to terminate the definitive agreement, but only upon a reasonable basis and after conferring with the Arizona Cardinals.

The Arizona Cardinals understands the City of Tempe is relying upon the undertaking set forth in this letter by the Arizona Cardinals, as an inducement to enter into the Magellan LOI, and subsequently, the definitive agreement.



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Aug-08-2001 15:11 From-

T-883 P.003/003 F-414

City of Tempe
August 8, 2001
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In addition, because the Arizona Cardinals and Tempe shall be entering separately into definitive and binding agreements with Magellan, we agree to fully cooperate and communicate with the other in our joint due diligence and related efforts in pursuing the assignment of the lease, and that neither party shall terminate their respective definitive agreement with Magellan, without prior consultation with the other.

If the provisions of this letter are acceptable, please sign in the space provided below and return a fully executed copy to the undersigned.

B&B Holdings, Inc., an Arizona corporation
d/b/a ARIZONA CARDINALS

By: [Signature]
Its: V. P. + Gen. Counsel

This letter of undertaking is accepted in accordance with its terms to be effective as of the date first written above.

CITY OF TEMPE, an Arizona municipal
corporation

By: _____
Its: _____

945793/1146-0003

AGREEMENT

This Agreement (herein so called) is made and entered into as of the _____ day of August, 2001, by and between the CITY OF TEMPE, an Arizona municipal corporation ("**Tempe**") and RIVERVIEW AT RIO SALADO, LLC, an Arizona limited liability company ("**Riverview**").

RECITALS:

Presently, Riverview at Rio Salado, LLC, an Arizona limited liability company ("**Riverview**") and Papago Park Center, Inc., an Arizona corporation ("**PPC**") are parties to that Papago Park Ground Sublease dated June 9, 2000 (the "**Existing Lease**"), which provides for the lease by Riverview of certain premises in the Papago Park Center (the "**Riverview Parcel**"), near Washington Street and Center Parkway, in Tempe, Arizona. The Existing Lease permits the use of the Riverview Parcel for a first-class, upscale multi-family residential housing development containing approximately 466 residential units (the "**Project**"). The Project is being developed and constructed by Riverview for its own use and account. Also, B&B Holdings, Inc., an Arizona corporation d/b/a Arizona Cardinals (the "**Arizona Cardinals**") and Tempe, on the one hand, as well as The Tourism and Sports Authority, an Arizona body politic ("**TSA**") on the other hand, have each been negotiating with PPC for two (2) leases for property within Papago Park Center, located west of, and adjacent to Riverview Parcel.

AGREEMENT:

In consideration of the respective agreements, herein after set forth, Tempe and Riverview hereby agree as follows:

1. Leasehold Estate. Subject to the consent of PPC, Riverview and PPC will agree on the "Closing Date" (defined below) to assign the lessee's interest under the Existing Lease to the Arizona Cardinals and Tempe on an "AS IS" basis with no representations or warranties by Riverview except as expressly set forth in this Agreement. The parties agree to use their mutual and diligent efforts to cause PPC, as ground lessor, to enter into a modification of the Existing Lease, on such terms and conditions as are deemed acceptable to Tempe.

2. Construction/Building Permit Refund. Tempe will refund the construction permit fees paid by Riverview for the Project to date, in the amount of \$1,269,311.50, within three (3) business days of the execution of this Agreement. The permits, described on Exhibit "A", attached hereto, will not be required to be surrendered to Tempe, and such permits shall remain in full force and effect, subject to the applicable deadlines, restrictions and caveats. The permits shall not be affected by this Agreement. The refund of permit fees would be deemed fully earned on the date paid, and non-refundable to Tempe. The approval by the City Council shall be requested to occur prior to August 10, 2001. If for any reason Tempe elects not to pursue the transaction and notifies Riverview on or before Monday, October 8, 2001, then the \$1,269,311.50 permit refund shall be retained by Riverview, the Agreement shall terminate, and neither party shall have any claim or liability thereafter, other than indemnification obligations which are expressly stated as surviving.

3. Due Diligence. Riverview shall provide either originals or copies of all reports generated or prepared by third parties which describe the condition of the Riverview Parcel, such as surveys, tests, studies and similar documents, as soon as possible, but in no event later than the execution of this Agreement. Riverview will grant Tempe, and its consultants rights of entry and investigation on the Riverview Parcel, and in this effort, Tempe shall be responsible for any damage or liability caused by Tempe or its consultants, and shall agree to indemnify Riverview from any claims arising from such entry, which indemnity covenant shall survive any termination of the Agreement.

4. Closing and Schedule. The assignment of the Existing Lease shall occur on Wednesday, October 10, 2001, or at the election of Tempe an earlier date (the "**Closing Date**"). Because the assignment of the Existing Lease will be to the Arizona Cardinals and Tempe, jointly, all critical dates in the definitive agreement between the Arizona Cardinals and Riverview be synchronous with the same dates as this Agreement.

5. Escrow. First American Title Insurance Agency (Carol Peterson) shall act as escrow agent for the transactions described herein.

6. Representations and Warranties. Riverview hereby represents and warrants to Tempe the following:

a. Lease. The Lease is in full force and effect, and no act, omission or condition exists which constitutes a breach or default thereof, nor does there exist any act, omission or condition, which with the giving of notice, the passage of time or both will become a breach or default under the Lease. All conditions of the Lease to be satisfied, and covenants to be performed, by Lessee that are necessary to the enforceability or effectiveness of the Lease have been satisfied or performed. The Lease has not been modified, amended or terminated, and the Lease as described in Exhibit "A" is the entire agreement which governs the Leasehold. Riverview shall not modify, amend or terminate the Lease after the Opening of Escrow.

b. Agreements. Riverview has not entered into any contract, operating arrangement, lease, or other agreement relating to the Property which will remain in effect after the Close of Escrow, and Riverview is not in default under any of the foregoing. There are currently no defaults, nor events, conditions or omissions (nor any events, conditions nor omissions, but for the giving of notice, the passage of time, or both would become a default) under the Lease, or any other agreement which in any manner pertains to the Property.

c. Taxes. Riverview has paid or will pay in full to the Closing Date all state and local business taxes pertaining to the Property (including, without limitation, all corporate, sales, rent, gross receipts, withholding, payroll and unemployment insurance taxes).

d. No Litigation. There is no existing litigation or claim, nor, to the best of Riverview's knowledge, threatened or pending, with respect to the Property.

e. No Government Actions or Litigation. There are no violations of laws, ordinances or codes of any governmental body, nor to the best of Riverview's knowledge, threatened or pending, with respect to the Property. Riverview has no knowledge of any planned public improvements that will result in special assessments against the Property, nor any pending

or threatened condemnation proceedings or zoning or other land use regulation proceedings relating to the Property. Riverview has not received any notices from governmental agencies requiring alterations or corrections of any existing conditions at the Property.

f. Hazardous Materials. To the best of Riverview's knowledge, there has been no and there currently is no generation, location, transportation, storage, treatment, discharge, disposal or release upon, in or under the Property of any Hazardous Materials or any "pollutant" (as that term is defined in A.R.S. § 49-201(23)) subject to regulation under the Resource Conservation and Recovery Act (as amended by the Hazardous and Solid Waste Amendments of 1984), the Comprehensive Environmental Response, Compensation and Liability Act (as amended by the Super-fund Amendments and Reauthorization Act of 1986), or any other applicable State or Federal environmental protection law or regulation. The term "Hazardous Materials" shall mean any hazardous, toxic or contaminated substance, material or waste which is or becomes regulated by any local governmental authority, the State in which the Property is located or the United States Government, including, without limitation, (a) substances defined as "hazardous substances", "hazardous materials" or "toxic substances" in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 USC Section 9601, et. seq.) and/or the Hazardous Materials Transportation Act (49 USC Section 1801, et. seq.), and (b) those substances defined as any of the foregoing in the regulations adopted and publications promulgated pursuant to the aforesaid laws. There are no underground storage tanks located at the Property.

g. No Flood Hazards. Except as set forth in the Survey, to the best of Riverview's knowledge, no portion of the Property is located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards; no areas within the Property must be set aside for retention, "green belt", open space or drainage, or for a park, school or other use required by any governmental entity, and no portion of the Property is included in or subject to any existing or proposed improvement district.

h. Property Materials. To the best of Riverview's knowledge, the Property Materials are true and correct in all material respects. Further, the financial information, loan applications, and pro forma financial statements and projections, provided to Tempe prior to or with the Property Documents are an accurate presentation of Tempe's financial forecasts for its intended multifamily project for the Property, and are based on the normal and reasonable assumptions and calculations used by Riverview in analyzing said project, and presented to Riverview's investors and lenders. Riverview's building permits, construction drawings, loan commitments and agreements with contractors and consultants are final, binding and enforceable, and Riverview would have completed the development, construction, financing, lease-up and disposition of the project on the Property in accordance with such documents, including the financial forecasts.

i. No Omissions. No representation or warranty made herein by Riverview, nor any statement, information or document given or to be given to Tempe pursuant hereto, contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make the statements contained therein not misleading.

j. Authority and Existence. Riverview has all requisite authority to execute this Agreement and consummate the transactions described herein, and Riverview will not violate the terms of any other agreement to which it is bound as a result. Riverview is a duly formed limited liability company in Arizona, and the person executing this Agreement has been duly authorized to execute all documents, including this Agreement on behalf of Riverview.

The matters set forth in this Section constitute representations and warranties by Riverview which will be materially true and correct as of the date hereof and on the Closing Date and which will survive the Closing Date. If Riverview becomes aware of any facts or circumstances which cause any of such representations and warranties to become materially false or incorrect, Riverview will promptly notify Tempe of same. Riverview hereby agrees to indemnify, defend and hold Tempe harmless from and against any claims, actions, costs, fees, expenses, damages, obligations, penalties, fines and liabilities (including, without limitation, attorneys' fees and costs), arising out of or relating to any breach by Riverview of its representations, warranties or covenants contained in this Agreement.

7. Remedies.

a. Riverview's Remedies. If Tempe fails to refund the permit fees in accordance with the terms of this Agreement, or to timely close escrow as required hereunder, Riverview shall be entitled, as Riverview's sole and exclusive right and remedy hereunder, to terminate this Agreement by giving written notice of termination to Tempe, in which event Riverview shall retain the permit fees (if paid) as consideration for acceptance of this Agreement.

b. Tempe's Remedies. Upon a breach or default by Riverview hereunder, Tempe shall be entitled to exercise any one or more of the following remedies: (i) terminate this Agreement, in which event Riverview will return the permit fees to Tempe not later than the second business day after such termination; (ii) seek specific performance of Riverview's obligations hereunder; or (iii) take any other action or remedy available to Tempe at law or in equity. The foregoing remedies of Tempe are cumulative and are not intended to be exclusive.

8. Notices. All notices, demands and requests under this Agreement must be in writing, and will not be effective unless given by prepaid registered or certified mail, return receipt requested, by nationally recognized commercial overnight courier service, by hand-delivery with a signed acknowledgement of receipt by the receiving party, or by confirmed facsimile transmittal (if a facsimile number is given below) (provided that facsimile notices must concurrently be given by one of the other permitted means of delivery set forth above), addressed as follows:

(a) If addressed to Riverview:

Riverview at Rio Salado, LLC
c/o Magellan Development, LLC
2777 E. Camelback Road, Suite 150
Phoenix, Arizona 85016
Attn: David Dewar
Facsimile No. (602) 333-3740

with a copy to:

Snell & Wilmer LLP
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202
Attn: Craig K. Williams
Facsimile No. (602) 382-6070

(b) If addressed to Tempe:

City of Tempe
31 East 5th Street
Tempe, Arizona 85281
Attn: C. Brad Woodford
Facsimile No. (480) 350-8645

or at such other address or facsimile number as any party may hereafter designate by written notice to all other parties. The effective date of all notices shall be the date of receipt by the party to whom the notice is addressed (with any facsimile notice being effective upon receipt of the facsimile transmittal provided that such facsimile notice is concurrently given by one of the other permitted means of delivery set forth above), or if receipt of such notice is not accepted or is not possible due to a change in address or facsimile number for which the sending party did not receive notice, the effective date of such a notice shall be the date of attempted delivery.

9. Miscellaneous.

a. Additional Documents. Each party agrees in good faith to execute such further or additional documents as may be necessary or appropriate to fully carry out the intent and purpose of this Agreement.

b. Time for Performance. If the time for the performance of any obligation under this Agreement expires on a Saturday, Sunday or legal holiday, the time for performance shall be extended to the next succeeding day which is not a Saturday, Sunday or legal holiday.

c. Entry. At any time prior to the Close of Escrow, Tempe and its designated agents and contractors will have the right to enter upon the Property to conduct surveys, soils tests, investigations and studies.

d. Risk of Loss. The risk of loss or damage to the Property until the Close of Escrow shall be borne by Riverview.

e. Time of Essence. Time is of the essence of each and every provision and each obligation of this Agreement.

f. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which when taken together shall constitute one instrument.

g. Survival. All obligations referred to herein to be performed at a time or times after the Close of Escrow and all warranties and representations contained herein shall survive the Close of Escrow and delivery of the Deed.

h. Non-Occurrence of Close of Escrow. If the Close of Escrow does not occur for any reason other than the default of Tempe, Escrow Agent will return the permit fees to Tempe.

i. Entire Agreement. This Agreement constitutes the entire agreement between the parties. All terms and conditions contained in any other instruments previously executed by the parties in connection with the Property are superseded hereby and merged herein. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, personal representatives, successors and assigns. Tempe may assign its rights under this Agreement without the prior consent of Riverview.

j. Attorneys' Fees. If suit is brought by any party to this Agreement to enforce the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, expenses and court costs.

This Agreement is dated to be effective as of the date first written above.

"TEMPE"

CITY OF TEMPE, an Arizona municipal
corporation

By: _____
Neil G. Giuliano
Mayor

APPROVED AS TO FORM:

C. Brad Woodford
City Attorney

ATTEST:

City Clerk

“RIVERVIEW”

RIVERVIEW AT RIO SALADO, LLC,
an Arizona limited liability company

By: RIVERVIEW INVESTMENTS, LLC,
an Arizona limited liability company

Its: Sole Member

By: KINGSTON CAPITAL CO., LLC,
an Arizona limited liability company

Its: Authorized Member

By: _____
David C. Dewar

Its: Manager

EXHIBIT “A”

CONSTRUCTION AND BUILDING PERMITS

Exhibit “A”